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In the Supreme Court of the United States

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DELORES J. RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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The question presented in this federal income tax case is whether the decision below correctly rejected petitioner's attempt to split her single cause of action with respect to her 1965 income tax liability by successfully litigating a $50,000 net proposed deficiency for that year in the Tax Court and then litigating an alleged $65,000 overpayment for the same year in a district court refund suit.

The facts are undisputed and may be summarized as follows: In October 1966, petitioner filed her 1965 tax return and paid approximately $65,000 in income taxes for capital gains realized in that year. The Internal Revenue Service lost this tax return (I-R. 17-19).[1] In 1969,

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[1] "I-R." and "II-R." refer to the duplicated record in the court of appeals.

petitioner filed a second tax return reflecting such payment, together with a claim for refund of the entire payment on the basis of a previously unclaimed theft loss deduction (Pet. App. 28; I-R. 17-18). In February 1973, petitioner instituted this refund suit for the $65,000 in the United States District Court for the District of Oregon (Pet. App. 28). In July 1973, however, petitioner also filed a petition in the Tax Court seeking a redetermination of a net deficiency of approximately $50,000 for 1965[2] (Pet. App. 29; I-R. 18). In October 1973, petitioner dismissed her refund suit without prejudice (I-R. 6, 11).

The government subsequently discovered evidence of petitioner's filing of her first return in 1966 (I-R. 19). Petitioner thereafter moved the Tax Court to dismiss her petition without prejudice, on the ground that the $50,000 deficiency was barred by the statute of limitations (I-R. 27-31). The government objected on the grounds that the statute of limitations was not a jurisdictional defense, and that the entire 1965 income tax liability—including the alleged $65,000 overpayment—was properly before the Tax Court (I-R. 36-46). In May 1974, the Tax Court denied petitioner's motion to dismiss her petition without prejudice (I-R. 20). In June 1974, the Tax Court entered a decision that there was no deficiency. In so ruling, the court did not refer to the $65,000 alleged overpayment (I-R. 47).

In the interim, petitioner and the government stipulated to reinstatement of her district court refund suit for the alleged $65,000 overpayment, subject to the government's objection that the district court lacked jurisdiction under

[2]The total proposed deficiency was $115, 925.69 against which was credited petitioner's payment of $65,492.50 (I-R. 26).

Section 7422(e) of the Internal Revenue Code of 1954 (26 U.S.C.) (I-R. 11, 48).[3] The district court held that petitioner was entitled to a theft loss deduction for that year and upheld the refund (Pet. App. 45). The court of appeals reversed. It ruled that the Tax Court had jurisdiction to adjudicate petitioner's claimed $65,000 overpayment under Section 6512(b) and that the district court was thereby barred by *res judicata* from adjudicating the same overpayment under Section 7422(e) (Pet. App. 30-31).[4]

1. The court of appeals correctly held (Pet. App. 30-31) that Section 7422(e) deprived the district court of jurisdiction over her refund suit for 1965 because the Tax Court entered a decision with respect to a deficiency for the same taxable year. Section 7422(e) provides that "[i]f the taxpayer files a petition with the Tax Court, the district court * * * shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund." Here, the district court lost jurisdiction, because Section 6512(b) of the Code gave the Tax Court jurisdiction of both the deficiency and overpayment portions of the theft loss "subject matter" underlying the Tax Court petition.

Petitioner argues (Pet. 19-26) that requiring her to pay the full 1965 tax before litigating in the district court is unfair, in view of the government's loss of her first 1965 return. But even if the first 1965 return had not been lost, petitioner would still have been required to pay the full

[3]Contrary to petitioner's assertion (Pet. 4), the government stipulated to reinstatement of the district court suit subject to its jurisdictional objections (I-R. 11), and then promptly filed a motion to dismiss for lack of jurisdiction (I-R. 48-70).

[4]The court of appeals did not reach the merits of petitioner's claim to a theft loss deduction (Pet. App. 33).

$116,000 tax before suing in the district court. At all events, since petitioner could have litigated the full $116,000 amount in the Tax Court, the availability of that remedy refutes her charge that the decision below unfairly required her to pay the full tax.

The legislative history of Section 7422(e) is in accord with this analysis. At the time of its enactment, the pertinent House Report, H.R. Rep. 1337, 83rd Cong., 2d Sess. A431-A432 (1954) (emphasis added), stated:

> Subsection (e) of this section is a new provision to cover the situation where there is concurrent jurisdiction in the district court (or Court of Claims) and in the Tax Court over the same case. This may arise, for example, where the taxpayer files suit for refund in the district court and, while the suit is pending, a notice of deficiency is issued and he appeals that notice to the Tax Court. * * * *If the taxpayer appeals to the Tax Court then the district court (or the Court of Claims) shall lose jurisdiction over the refund.*

See also S. Rep. No. 1622, 83d Cong., 2d Sess. 148, 610-611 (1954). Acco l: *Flora* v. *United States*, 362 U.S. 145, 166 (1960);[5] *Dorsey* v. *United States*, 211 Ct. Cl. 339

[5]Petitioner suggests that Section 7422(e) does not preclude the district court from adjudicating the same year's tax claim as was involved in the Tax Court proceeding, because the statute states that " 'the District Court * * * shall lose jurisdiction of taxpayer's suit *to whatever extent* jurisdiction is acquired by the Tax Court *of the subject matter* of taxpayer's suit for refund.' " (Pet. 14; emphasis in petition). But Congress used the words "to whatever extent" to make clear that when the district court suit involves different years and different issues, the district court is deprived of jurisdiction of only those years actually before the Tax Court. The words "subject matter" were used to ensure that if the Tax Court proceeding involves issues which are determinative of such issues in years before the

(1976); *United States* v. *Joe Graham Post No. 119, American Legion*, 340 F. 2d 474, 476-478 (5th Cir. 1965). The same rule has repeatedly been applied under Section 6512, which bars a refund suit brought after a Tax Court petition has been filed with respect to the same income tax year. *E.g.*, *United States* v. *Wolf*, 238 F. 2d 447, 449-450 (9th Cir. 1956); *Elbert* v. *Johnson*, 164 F. 2d 421, 424 (2d Cir. 1947); *Fiorentino* v. *United States*, 226 F. 2d 619 (3d Cir. 1955); *Dorl* v. *Commissioner*, 57 T.C. 720, 721-722 (1972). There is no reason why a different rule should apply here simply because petitioner commenced her refund suit before she filed her Tax Court petition.

In sum, once a claim or cause of action for the income tax liability of a particular year has been properly submitted to the jurisdiction of the Tax Court, the taxpayer is barred from obtaining an adjudication of that year's liability in any other court. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-598 (1948).

2. Contrary to petitioner's argument (Pet. 6-7), the decision does not conflict with *United States* v. *Joe Graham Post No. 119, American Legion, supra*. There, the taxpayer first brought an income tax refund suit in the district court for its taxable year ended June 30, 1961. Subsequently, it filed a Tax Court petition covering the calendar years 1944 through 1960, urging that its tax should be computed on a fiscal year basis. The court of appeals held that the district court was deprived of jurisdiction of the fiscal year refund suit until the Tax Court decided whether a calendar or fiscal year tax period

district court—such as a loss carryback to an earlier year which is before the district court—the district court will stay its proceedings until the Tax Court decides the common issue and then apply the Tax Court holding. Neither of these two situations is involved in this case.

should be used. Only if the Tax Court decided that a fiscal year was correct and then dismissed the Tax Court petition for lack of jurisdiction, could the district court regain jurisdiction. The court, however, expressly recognized the principle inherent in Section 7422(e) as applied by the court of appeals here. Thus, the court stated (340 F. 2d at 476-477):

> The provisions of §7422(e) are designed to give the taxpayer an option, once he has received a ninety day deficiency notice from the Commissioner, to petition the Tax Court for a redetermination of the asserted deficiency or to refrain from filing such a petition and, having paid the alleged deficiency in full, proceed in the District Court on its suit for refund. He cannot do both because §7422(e) says that if the taxpayer files a petition with the Tax Court, the District Court "shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund."

Handshoe v. *Commissioner*, 252 F. 2d 328 (4th Cir. 1958), upon which petitioner relies (Pet. 7-12), is not to the contrary. There, the taxpayers appearing *pro se* instituted an income tax refund suit for 1954. Subsequently, they mistakenly filed a Tax Court petition for the same year "through inadvertence and ignorance of the law" (252 F. 2d at 329). The Tax Court denied taxpayers' motion to withdraw their petition without prejudice. While the court of appeals dismissed the appeal for lack of a final order, it suggested that the Tax Court should allow the requested withdrawal in order that the taxpayers could proceed with their refund suit. But *Handshoe* is of no assistance to petitioner in these refund suit proceedings. As the concurring opinion below

pointed out (Pet. App. 37), even on the assumption that the Tax Court erred in denying petitioner's motion to dismiss her petition, she should have appealed from that action; the district court in this refund suit has no jurisdiction to correct that claimed error.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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